

## **Exhibit 1**

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NEW YORK  
CIVIL ACTION NO. 6:11-cv-6310

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MPC FRANCHISE, LLC, and  
MP CLEARY, INC.,  
Plaintiffs,  
vs.

BRENT TARNTINO,  
Defendant.

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BRENT TARNTINO and PUDGIE'S  
PIZZA CORPORATION - HORSEHEADS, INC.,  
Counterclaim Plaintiffs,  
vs.

MPC FRANCHISE, LLC, and  
MP CLEARY, INC.,  
Counterclaim Defendants.

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This is the Examination Before Trial of  
BRENT TARNTINO

held on the 17th day of April, 2012  
held at the law offices of Cooper, Pautz &  
Weiermiller, LLP, 2854 Westinghouse Road,  
Horseheads, New York 14845, commencing at  
12:00 p.m.

REPORTED BY: NANCY H. SWARTZ  
Shorthand Reporter  
Notary Public

NHS COURT REPORTING  
(607)215-2201

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S T I P U L A T I O N S

It is stipulated by and between the  
parties hereto that the filing of the  
deposition is waived; that the deposition  
may be signed before any Notary Public;  
and that all objections except as to the  
form of the question are reserved to the  
time of the trial.

## 1 I N D E X:

3 W I T N E S S : Brent Tarantino

5 Examination By Pages

7 Mr. Zucker 4-61

9 Affidavit page 62

10 Certificate page 63

## 15 E X H I B I T S :

17 Number Description Page

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20 BT-2 Letter to Pudgie's owners 58

1           B R E N T    T A R N T I N O,  
2           having been called as a witness,  
3           having been duly sworn, was examined  
4           and testified as follows:

6                           EXAMINATION

7   BY MR. ZUCKER:

8           Q     Mr. Tarantino, my name is Jeff Zucker.   We  
9     just met.   I'm here to take your deposition in  
10    the case that's currently pending in Federal  
11    Court.   My clients brought a complaint and then  
12    you and your company brought a counterclaim.   So  
13    we're going to discuss issues regarding that  
14    case.   All right?

15          A     (Witness nods head).

16          Q     You have to keep all your responses  
17    verbal so the court reporter can take them down.  
18    You know, sometimes in a conversation you might  
19    want to answer, you think where my question is  
20    going, you might want to answer but what you  
21    should do in this deposition is wait until I get  
22    my question out.   That way your lawyer, if he  
23    wants to object, he can get his objection in and  
24    then you can answer.   It's easier for the court  
25    reporter to take down the responses if you talk

1 A Yes.

2 Q Yes, before that day. In your trademark  
3 application you took a declaration, you signed a  
4 declaration, do you remember that?

5 A Yes.

6 Q And one of the items that you signed off  
7 on in the declaration was that to the best of  
8 your knowledge no other person or entity was  
9 using that Pudgie's trademark?

10 A Yes.

11 Q Do you recall that?

12 A Yes.

13 Q If you knew that TruFoods was using the  
14 Pudgie's trademark before July 2nd, the date you  
15 signed the declaration, why did you sign the  
16 declaration stating that no one else was using  
17 that trademark?

18 A Because I was filling the application out  
19 for pizza, pasta and subs. And the Pudgie's mark  
20 that is registered is under restaurants and his  
21 entity, that I found out through website and  
22 research, was chicken.

23 Q So you're reading the declaration to  
24 restrict it just to the goods and services you  
25 were registering?

1 A Yes.

2 Q Did you have a lawyer help you with the  
3 registration application?

4 A Yes.

5 Q What was his name?

6 A Aaron Alsheimer.

7 Q And what law firm is he with?

8 A Sayles & Evans.

9 Q Is that in Horseheads?

10 A Elmira.

11 Q Elmira. What parts of the application  
12 did you personally complete and what parts did he  
13 complete?

14 A I believe he completed the entire  
15 application.

16 Q And what was your role in his completing  
17 the application?

18 A He received all of the information in the  
19 application from me.

20 Q And did you sit together in his office  
21 and go through that?

22 A Sometimes.

23 Q And what about on July 2nd, 2010, the  
24 date that the application was actually submitted  
25 to the U.S. Patent and Trademark Office, were you

1 And you admitted that paragraph, right?

2 A Yes.

3 Q It doesn't reference that your sister or  
4 you or Edward operates the business, correct?

5 A It does not.

6 Q It references that the corporation,  
7 Pudgie's Pizza Corporation - Horseheads, Inc.  
8 operates the business, right?

9 A Yes.

10 Q And you admitted that, correct?

11 A Yes.

12 Q In paragraph 22 of the complaint we  
13 allege that, quote: In his trademark  
14 application, that's referring to you, Tarantino  
15 claims that he first began using the mark in  
16 commerce in 1980. Do you see that?

17 A 22?

18 Q Uh huh.

19 A Yes.

20 Q Okay. Is that an accurate statement?

21 A I believe that to be accurate.

22 Q And how old were you in 1980?

23 A It's a very difficult question to answer.

24 Q You can't answer the question how old you  
25 were in 1980?



1 A I cannot.

2 Q Why is that?

3 A I'd have to do the math.

4 Q Go ahead.

5 A You want every day?

6 Q No, I'm asking how old you were in 1980?

7 A Okay.

8 Q What year were you born in?

9 A 1972.

10 Q So in 1980 you were eight years old.

11 I'll do the math for you.

12 A I was seven. I'll do the math for you.

13 Q Okay. If you want to say seven, that's  
14 fine. So tell me at seven years old how you were  
15 using the mark in commerce, the mark Pudgie's?

16 A I was not.

17 Q Now, in your trademark application you  
18 say that you were. Are you aware of that?

19 A Yes.

20 Q And today you're saying that's not true,  
21 right?

22 A My mother was using -- I guess I don't  
23 understand the question.

24 Q Okay. You filed a trademark application  
25 in July 2010 with the help of your lawyer, right?

1           A     Yes.

2           Q     You, meaning Brent Tarantino, the person  
3 sitting here?

4           A     Yes.

5           Q     Under that trademark application you  
6 swore under penalty of perjury that you, Brent  
7 Tarantino, were using the mark as early as 1980,  
8 right?

9           A     Yes.

10          Q     In 1980 you say you were seven years old,  
11 right?

12          A     Yes.

13          Q     And you just admitted you weren't doing  
14 anything to use the mark in commerce in 1980?

15          A     I was not using the mark in commerce in  
16 1980.

17          Q     What have you done to correct the  
18 statement in your trademark application?

19                   MR. MCGUIRE: Object to the form.

20          A     Nothing.

21          Q     Do you plan to correct the statement?

22          A     No.

23          Q     And why's that?

24          A     Because in 1980 I was not directly using  
25 the mark but my mother was, so I was indirectly

1 using the mark in 1980. When she died, I  
2 inherited those years, in my opinion, therefore,  
3 I was indirectly using the mark in 1980 and  
4 continue to do so today.

5 Q So you believe that when your mom died in  
6 2007 you inherited what?

7 A Her years.

8 Q Her years of what?

9 A Owning the business.

10 Q Okay. But you just told me that when she  
11 operated the business, she operated it as a  
12 franchisee, right?

13 A Yes.

14 Q And as a franchisee, she was licensing  
15 the mark from someone else, right?

16 A Yes.

17 Q So what did you inherit?

18 A The operation of Pudgie's and the use  
19 since 1980.

20 Q But if she was operating it as a  
21 licensee, as a franchisee, explain to me what you  
22 think you inherited?

23 A My mother owned Pudgie's Pizza in  
24 Horseheads in 1980.

25 Q Right.

1           A       I'm trying to think of the answer. If  
2       you can give me a moment, I would appreciate it.

3           Q       Oh yeah, sure.

4           A       I believe so.

5           Q       If it wasn't Mr. McGuire, would it be  
6       someone from his office or a totally different  
7       attorney from a different office?

8           A       Totally different attorney.

9           Q       Now, the specimen that you submitted, you  
10      submitted the specimen to show your use of the  
11      trademark Pudgie's in commerce, is that correct?

12          A       That's correct.

13          Q       And how is that specimen, that picture,  
14      how did it -- explain to me how it showed your  
15      use, Brent Tarantino's use of the trademark  
16      Pudgie's in commerce?

17          A       I don't understand the question.

18          Q       The purpose of the specimen that you  
19      submitted was to show Brent Tarantino's use of the  
20      trademark Pudgie's in commerce, correct?

21          A       If I remember correctly, yes.

22          Q       Explain to me how that specimen you  
23      submitted shows that Brent Tarantino was using the  
24      Pudgie's trademark in commerce?

25          A       If I remember correctly, I sent a pizza

1 box in from the shelf in my existing Pudgie's  
2 location that I was working at every single day,  
3 I grabbed it off of the shelf. I took a picture  
4 of it. I sent it in to my attorney's office and  
5 then I put the pizza box back on the shelf that I  
6 was personally working at, that I personally  
7 owned.

8 Q And, again, the Pudgie's Pizza shop in  
9 Horseheads where you were working, that's what  
10 you're referring to?

11 A Yes.

12 Q And that shop was owned by the Pudgie's  
13 Pizza Corporation - Horseheads, Inc., is that  
14 correct?

15 A That I own, yes.

16 Q Right. But it was operated, just so we  
17 have a clear record, by the corporation, correct?

18 A I own the corporation, correct.

19 Q Well, I understand that you, your sister  
20 and your brother owned it, right?

21 A Right. Me, my sister and my brother  
22 owned the corporation, correct.

23 Q Paragraph 25 of the complaint states  
24 that: Tarantino declared under penalty of perjury  
25 and pursuant to 18 USC Section 1001, that he was

1 Q -- inaccurate in paragraph 25?

2 MR. MCGUIRE: Object to form.

3 A I still don't understand.

4 Q Okay. We can move on. That's a fine  
5 answer.

6 In paragraph 26 the plaintiffs allege that  
7 you declare under penalty of perjury that the  
8 statements in the trademark application were true.  
9 And your answer, you deny that.

10 Are you denying that the statements that  
11 you made were true?

12 A Absolutely not. Everything that I said  
13 in my United States Patent and Trademark Office  
14 application, under my belief, was 100 percent  
15 accurate.

16 Q Okay.

17 A And I never intended to defraud or lie to  
18 anybody.

19 Q Well, why are you saying here in  
20 paragraph 26 that you deny that?

21 A I have no answer for that. But I can  
22 assure you that I've never lied or defrauded  
23 anybody.

24 Q But this is your answer that you  
25 submitted.

1 it is now. I believe all my answers to be  
2 accurate. If they're not accurate, my ultimate  
3 goal is to keep the mark Pudgie's, which I  
4 believe I will be, to be used with pizza, pasta  
5 and subs, submarine sandwiches, excuse me. And I  
6 would certainly ask them to allow me to amend  
7 mistakes that are made that are not based on the  
8 granting of the mark.

9 Q Okay. That's fine. In the ninth  
10 affirmative defense, that's the last one on page  
11 seven, you say that plaintiffs -- that's my  
12 clients the Clearys and their companies:  
13 Plaintiffs claims are barred in whole or in part  
14 by the doctrine of unclean hands.

15 Can you explain factually what you're  
16 saying here?

17 A Sure. I believe that the chicken guy, I  
18 don't even know who he is, it's so funny to me,  
19 the chicken guy --

20 Q Help me out. I don't know who you're  
21 talking about.

22 A I don't either. I don't know who he is.  
23 But his entity registered under the United States  
24 Patent and Trademark Office is restaurants --

25 Q Are you talking about TruFoods?

1           A       TruFoods. Whoever he is. So the  
2       TruFoods guy can't grant marks. And to me it  
3       sounds like, and I've never seen any of this  
4       information, nobody has ever showed me anything,  
5       but from what they're saying, is that they  
6       received permission or, I guess I don't know the  
7       real word, some sort of contract with the chicken  
8       guy to sell pizza, pasta and subs. And to me  
9       that's not -- that's impossible. There's nothing  
10      that says the chicken guy can grant marks. I  
11      looked through all of the USPTO stuff and it  
12      never says the chicken guy can give anybody  
13      rights.

14           Q       Okay.

15           A       So I don't understand how these guys are  
16      running around saying we have the rights to  
17      pizza, pasta and subs. Show me. There's no, I  
18      looked, there's -- show me pizza, pasta and  
19      submarine sandwiches and this can go away.

20           Q       And in your sentence, these guys are  
21      running around doing this, are you talking about  
22      the Clearys or are you talking about the TruFoods  
23      guys?

24           A       The Clearys. The Clearys are claiming  
25      the chicken guy gave them pizza, pasta and



1 Q So that's your time gets wasted?

2 A My time is, oh, wasted?

3 Q And would there be any --

4 A Hours. I should record them.

5 Q And would there be any other damages -- I  
6 understand that you have to spend time doing this  
7 explaining. Is there any other kind of damages  
8 you're suffering as a result of the MP Cleary  
9 group coming into Elmira Heights?

10 A As far as -- very difficult to show. I  
11 believe there has been but if I was going to have  
12 to show, you know, let's just take two people,  
13 like the Elmira Heights Police Department. I can  
14 show that they've been going to the Elmira  
15 Heights Police Department because me and Rob  
16 Cleary have a mutual friend there. And then  
17 Horseheads also goes to the Elmira Heights Police  
18 Department.

19 Prior to that North Main or College  
20 Avenue would never, ever one time, and he's been  
21 there for 15 years, can he ever remember them  
22 ever going there. So every time MP Cleary would  
23 deliver there, that order previously would have  
24 been a Horseheads order.

25 And I probably have 15 to 20 of those,

1 you know, friends of mine that live in Elmira  
2 Heights or those situations that I could actually  
3 write out and provide those names.

4 Q Well, why would your friends not use your  
5 store?

6 A I just explained it to you. Me -- like,  
7 the Elmira Police Department, me and Rob have a  
8 mutual friend. Okay. I don't pick his friends  
9 and he doesn't pick my friends.

10 Q No, I understand that one example.

11 A Right. Well, that would be the example  
12 for all 15.

13 Q Oh. Okay.

14 A Like, I would use another specific name,  
15 Wally Gonzalez, one of my best friends, just did  
16 a complete remodel at your client, Rob Cleary's  
17 house. Mutual friends. He lives in the Village  
18 of Elmira Heights. So now that Rob is coming up  
19 there, he probably would be splitting between the  
20 two of us, where before it would just be  
21 Horseheads.

22 Q Okay.

23 A And I would have other examples of those.  
24 So where we have mutual friends, I can show you  
25 that if they ever have, they never did before,

1 you know.

2 That specific person is the one that  
3 brought in their first flyer that ever said ever  
4 the words Elmira Heights on it to me. Wally  
5 Gonzalez. He said, dude, how bad are you gettin'  
6 screwed? And he heard me call Rob the second I  
7 seen it. I couldn't believe it. I couldn't  
8 believe it that I was backstabbed the way I was.

9 Q When you submitted or were working on  
10 your trademark application, either you or your  
11 lawyer, did either you or your lawyer do a  
12 search, did you search to see if there were any  
13 other users of the Pudgie's trademark?

14 A Yes.

15 Q Who did that?

16 A I did.

17 Q And how did you do that search?

18 A Through the USPTO website.

19 Q Did you do any other kind of searching?

20 A No.

21 Q Like, what's referred to as a common law  
22 search?

23 MR. MCGUIRE: Just for clarification,  
24 can you explain the common law so he could  
25 understand that?